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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. [redacted] 1411

FIRST SECURITY NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, ET AL., *Appellants*

v.

UNITED STATES OF AMERICA, *Appellee*

On Appeal from the United States District Court for the Eastern District of Kentucky

JURISDICTIONAL STATEMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No.

FIRST SECURITY NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, ITS EXECUTIVE OFFICERS, Edward S. Dabney, LeRoy M. Miles, Thomas N. P. McCormick, Neilan Thurman, Lindsay I. Fitch, Benjamin J. Elkin, Robert R. Emmett, Herbert L. Petit, Jr., Roy C. Justus, Roy L. Tolliver, William L. Rouse, Jr., J. D. Reeves, Phillip L. Wright, Jr., W. Roland Fisher, Gayle H. True, James L. Baker, B. D. Ellis, Oliver C. Smart, Edw. F. G. Hessel, John L. Everton, Arnold L. Johnson, Jr., Edwin V. Mack, Frank Wilford, John S. Hancock, Robert C. Gosser, Homer L. Drew, Arthur E. Abshire, Morgan Goodpaster, Ronald A. Collins, J. Ed Parker, Jr., Paul Sturgill, J. F. Liston, James H. Robinson, Jr., W. T. Mitchell, Jr., Frank B. Barker, C. Henry Besten, John S. Swift, Charles P. Partin, Owen Hitt, W. H. Courtney, Jr., John H. Tompkins, Charles L. Simpson, Robert I. Lowrey and Roberts T. Bates, AND ITS DIRECTORS, David Ades, Dan D. Brock, William H. Courtney, Leonard G. Cox, Jr., E. S. Dabney, Homer L. Drew, Dan S. Estill, W. Rodes Estill, Floyd I. Fairman, J. Douglas Gay, Jr., Louis Lee Haggin II, Louis Hillenmeyer, Walter W. Hillenmeyer, Jr., Harry J. Huether, Frazer D. LeBus, Jr., William E. Lehman, Edwin V. Mack, LeRoy M. Miles, W. Emmet Milward, Gayle A. Mohney, John C. Nichols, Gilmore N. Nunn, S. Headley Shouse, J. Robert Smith, Barckley A. Storey,

Dwight G. Tenney, R. G. Vallandingham, Clair F. Vough, Fred B. Wachs, J. Stephen Watkins, George S. Wiedemann, Jr., F. H. Wright and William T. Young, *Appellants*

v.

UNITED STATES OF AMERICA, *Appellee*

On Appeal from the United States District Court for the Eastern District of Kentucky

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JURISDICTIONAL STATEMENT

OPINION BELOW

The unreported order of the court below, issued on February 16, 1965, from which this appeal is taken appears at Appendix A hereto. In addition, there is set forth at Appendix B the transcript of the hearing in the court below on February 16, 1965, at which this order was handed down. At Appendix C appears the transcript of the hearing in the court below on March 18, 1965, at which a motion to enter an order of divestiture superseding the order of February 16, 1965, and a motion to set aside this order were denied.

JURISDICTION

On March 1, 1961, the United States filed this civil antitrust action in the court below pursuant to Section 4 of the Sherman Act, 15 U.S.C. § 4, seeking to enjoin certain alleged violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2. On July 30, 1962, the lower court (Ford, J.) entered its judgment dismissing

the complaint with prejudice. A timely appeal was taken by the United States directly to this Court under Section 2 of the Expediting Act, 15 U.S.C. § 29. This Court, on April 6, 1964, reversed the judgment of the court below and remanded the case for further proceedings in conformity with its opinion. 376 U.S. 665. On February 16, 1965, the court below (Swinford, J.) entered a final order adjudging the appellants herein in contempt of court for failing "to comply with the mandate of the Supreme Court of the United States." A motion by the United States to supersede this order and a motion by the appellants to set this order aside were overruled on March 18, 1965 (Appendix D). A Notice of Appeal was filed by appellants on March 18, 1965.

Jurisdiction to review the order of contempt derives from Section 2 of the Expediting Act, 15 U.S.C. § 29, which provides that appeals from final judgments in civil antitrust suits brought by the United States "lie only to the Supreme Court." The order appealed from is a final judgment of contempt against these appellants. Moreover, the contempt order relates to and is inextricably involved with the final judgment of the court below that was previously reviewed in this Court on a direct appeal. Accordingly, direct review of this judgment of contempt is appropriate under the Expediting Act. Moreover, this Court has plenary power to determine whether its mandate has been misconstrued, frustrated or disobeyed by any actions of appellants or of the court below.[1]

---

[1] See *Continental Ins. Co.* v. *United States*, 259 U.S. 156, 166 (1922); *Baltimore & O. R. Co.* v. *United States*, 279 U.S. 781, 785 (1929). See also *In re Sanford Fork & Tool Co.*, 160 U.S. 247 (1895); *City Nat. Bank of Ft. Worth* v. *Hunter*, 152 U.S. 512 (1894).

Finally, appellants respectfully request that in the alternative this Jurisdictional Statement be considered as a petition for a writ of certiorari or a writ of prohibition (and as a motion for leave to file such a petition) to be issued to the court below to review its order of contempt and to restrain that court from acting in excess of its jurisdiction. This Court has jurisdiction under Section 1651(a) of the Judicial Code, 28 U.S.C. § 1651(a) to issue such writs in aid of the appellate jurisdiction that it exercised when this case was first before this Court on direct appeal. Cf. *De Beers Consolidated Mines, Ltd.* v. *United States,* 325 U.S. 212 (1945).

QUESTIONS PRESENTED

The questions presented by this appeal are:

1. Whether the order of contempt entered on February 16, 1965, is valid when it was entered by the court below *sua sponte* without any hearing thereon or notice thereof, without any opportunity for response being afforded and without any evidence to support it.

2. Whether any or all of the appellants may be legally adjudged guilty of contempt for failure to comply with the mandate of the Supreme Court of the United States filed in the court below on May 4, 1964, when neither said mandate nor the opinion of the Supreme Court of the United States, nor any order of the court below after remand defined the appropriate relief to be granted nor ordered or directed appellants to perform or do any particular act or thing.

3. Whether it is beyond the jurisdiction of the court below to adjudge appellants in contempt for an alleged failure to comply with the mandate of the Supreme Court of the United States.

STATUTE INVOLVED

Courts established under the Constitution of the United States are expressly given power to impose punishment for contempt by 18 U.S.C. § 401, which provides:

> "A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> (2) Misbehavior of any of its officers in their official transactions;
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command."

STATEMENT OF THE CASE

This is an appeal from an order of the United States District Court for the Eastern District of Kentucky (Swinford, J.) entered on February 16, 1965, adjudging First Security National Bank and Trust Company of Lexington ("First Security") and "its executive officers and directors"[2] to be in contempt of court for "failure . . . to comply with the mandate of the Su-

[2] The District Court made no effort in its order or otherwise to identify the particular persons that it intended to subject to the penalty of this order. First Security has 15 directors, 18 advisory directors and 44 officers. All of them were made parties to this appeal to preserve their rights in the event the court below may have intended that all be subject to this penalty. The order of contempt directed the Clerk to mail a certified copy thereof to each executive officer and director. Apparently exercising his own discretion, the Clerk mailed copies to all directors and advisory directors, and to 15 of the 44 officers who are parties to this appeal.

preme Court." This order adjudged that the appellants pay a fine of $100 a day until they "purge themselves of the contempt by a full compliance with the mandate of the Supreme Court." This order was entered by the court below *sua sponte* and summarily, without any hearing or notice, without any opportunity for response being afforded and without any evidence to support it.

1. Prior Proceedings in This Court

On April 6, 1964, this Court handed down its opinion and judgment in this case, *sub nom United States* v. *First National Bank and Trust Company of Lexington, et al.*, 376 U.S. 665, reversing a judgment of the United States District Court for the Eastern District of Kentucky (Ford, J.). The case had been brought to this Court on a direct appeal by the United States under Section 2 of the Expediting Act, 15 U.S.C. § 29, from an order of the District Court dismissing the complaint. This Court held that the consolidation of First National Bank and Trust Company of Lexington and Security Trust Company constituted a combination in restraint of trade in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

The ordering clause of this Court's opinion stated only "Reversed." The Court's formal judgment (Appendix E), filed in the District Court on May 4, 1964, reversed the judgment of the District Court and ordered:

> "that this cause be, and the same is hereby, remanded to the United States District Court for the Eastern District of Kentucky *for further proceedings in conformity with the opinion of this Court.*" (Emphasis added.)

Neither the judgment nor the opinion of this Court undertook to specify in any way the relief to be granted upon the remand. It is clear, however, that in remaining silent on the question of relief this Court intended to leave this question to be decided initially in the lower court.[3]

2. Proceedings in the District Court After Remand

On April 20, 1964, just two weeks after the opinion of this Court was handed down, and prior to the issuance of this Court's judgment, officers of First Security and its counsel, upon the invitation of the Assistant Attorney General in charge of the Antitrust Division, met with representatives of the Department of Justice in Washington to discuss the nature and form of the relief to be proposed to the District Court. The Department of Justice invited the defendant to analyze and review all problem areas and to submit to it for consideration a plan of divestiture which the defendant believed could be followed in accomplishing divestiture.

On July 1, 1964, the District Court took its first action since remand of the case. On that date it entered an order *sua sponte* giving defendant until September 1,

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[3] *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651 (1964), a merger case arising under the Clayton Act, was decided on the same day as this case. Mr. Justice Douglas wrote the opinion in both cases. In *El Paso* the Court not only reversed the lower court judgment upholding the merger but directed the District Court to order divestiture "without delay." Divestiture "without delay" was ordered in that case because "appellees have been on notice of the antitrust charge from almost the beginning." (376 U.S. at 662) Traditionally, however, this Court has assigned to the District Court "the responsibility *initially* to fashion the remedy," in antitrust cases. *United States* v. *E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 323 (1961). See also *International Salt Co., Inc.* v. *United States*, 332 U.S. 392, 400 (1947).

1964, to report the progress made in complying with the judgment of the Supreme Court of the United States (Appendix F). Slightly more than one month later, on August 7, 1964, counsel for the bank submitted a proposed plan of divestiture to the Department of Justice.

There followed conferences between the Department of Justice, counsel for the bank and the various federal and state banking agencies. The banking commissioner of Kentucky was consulted because the re-created Security Trust would be a state bank that would have to be chartered by him. The Federal Reserve Board was consulted because the new Security Trust was to be a member of the Federal Reserve System, just as old Security Trust had been. The Federal Deposit Insurance Corporation was consulted in an advisory capacity because it would be the insurer of the deposits of the new Security Trust, and because the deposits of First Security, a substantial part of which were to be transferred, were already insured.[4] The Comptroller of the Currency had to be consulted because any plan of divestiture would necessarily involve a reduction in the assests of First Security, a national bank subject to the Comptroller's supervision.

On August 25, 1964, pursuant to a joint motion of the parties, the District Court extended the time for filing a report until December 1, 1964 (Appendix G.)

On October 12, 1964, after a hearing on a petition of one Dages I. Boyle to intervene and be made a party to the action, the Court entered an order directing that:

> "the intervenor shall not be permitted to participate in any negotiations now being effected or in

[4] Admission of new Security Trust to the Federal Reserve System would automatically carry with it federal insurance of accounts, under § 4(b) of the Federal Deposit Insurance Act, 12 U.S.C. § 1814(b).

progress between the parties, and the parties to this action upon reaching any agreement or agreed judgment, may present the same to the Court without consulting the intervenor or any other person." (Appendix H)

This order seemed to contemplate that the parties would continue their negotiations and would attempt to formulate an agreed judgment to be presented to the District Court for consideration.

On November 19, 1964, again at the joint request of the parties, the District Court extended the time for making a report until January 11, 1965 (Appendix I).

In late December, 1964, the Justice Department indicated for the first time that it was ready to engage in detailed discussion as to the type of divestiture to which it would consent. Many days were spent in January, 1965, working out details in conferences between counsel for the bank, the Department of Justice and the Comptroller of the Currency.

On January 11, 1965, the parties jointly reported to the District Court that the bank had submitted to the United States a draft plan of divestiture as a basis for discussion of the settlement of the litigation;[5] that on December 28, 1964, defendant received from the United States a letter dated December 24, 1964, indicating the basic principles on which it believed a decree should be based, some of which were in accord with the draft plan and some of which were not in accord with it; and that the parties needed additional time to negotiate a settlement. On the joint motion of the parties, the District Court extended the time to report to February 16, 1965 (Appendix J), but indicated from

[5] This draft plan had been submitted on August 7, 1964.

the bench that this was the last extension which would be granted without good cause being shown.

Shortly prior to February 16, 1965, the parties reached substantial agreement on the main steps to be followed in recreating old First National and old Security Trust as separate banking institutions having the same relative positions they had prior to the merger. This agreement was embodied in a proposed Interlocutory Decree, which by stipulation the parties jointly recommended for entry by the District Court as being "appropriate under the Supreme Court's mandate" (Appendix K). The stipulation and Interlocutory Decree were submitted in open court to the District Court by Government counsel[6] who was directed to read the same aloud to the Court. After a short colloquy with counsel, but without further consideration or study of the proposed decree and stipulation, the Court stated (Appendix B, pp. 10a-15a):

"The Court: Now, gentlemen, I am going to overrule your motion to accept that interlocutory

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[6] Government counsel stated to the Court (Appendix B, p. 3a):

"Pursuant to the Court's order originally of July, and more recently of January, the parties have been engaged in extensive negotiations and consultations in an attempt to arrive at an agreed upon order that could be submitted to the Court for its approval and consideration.

"I might say that we have had discussions with the top staff people of the Federal Deposit Insurance Corporation, the Federal Reserve Board, the Comptroller of the Currency's office, and other experts in the banking field. We felt that this was important since this would be the first time two banks will have been separated by order of court.

"After extended discussion we have prepared to submit to the Court this morning a stipulation, attached to which is a proposed interlocutory decree, which we are prepared to recommend that the Court adopt . . . ."

decree as compliance with the mandate of the Supreme Court of the United States. Apparently, instead of attempting to comply with the mandate, under the opinion of the Court and under the orders of this Court, you have been organizing new banks.

* * * * *

"This court sits here as a district court in a ministerial capacity. I do not think that I would have jurisdiction under the mandate of the Supreme Court to even consider your proposed interlocutory decree here this morning. I do not think this Court has jurisdiction to maintain for a period of years the supervisory capacity involving the handling of the stock and accounts of the two newly created banking institutions that this proposal suggests. I would sit here ad infinitum in that capacity, all based on the proposition of the Supreme Court's mandate, which says that these two banks would go back to where they were on the 28th of February 1961, and which the Court's order on March 6, 1961, sought to assure. I can't conceive that you could expect the Court to accept this proposed plan, which you offer here as an interlocutory decree, as compliance with the mandate of the Supreme Court of the United States.

"The integrity of this Court is the most significant and important thing in the world and the orders of this Court must be obeyed and must be observed and this Court has the power and authority to enforce them and that is what I will have to do. I realize and I have tried to be most generous—I don't like to use the word 'generous' except in a legal term—as I did recognize the difficulties which confronted you, but dealing with banks is a serious matter. There are a great many people involved and there are a great many people who have no recourse except their confidence and trust in the institution. Both these have been great financial institutions and

are today, but the Supreme Court has held that the judgment of this Court in permitting the consolidation which was based upon evidence heard here and in a large measure, I would assume, by the facts brought out here that, as I understand it, it had been approved by the Comptroller, the United States, which was a significant thing, but the Supreme Court has held that these two banks have been in violation of the Sherman Act and that they should not be consolidated and they set forth in a comprehensive opinion their reasons for the conclusion, the judges of the Supreme Court. So, it devolves upon the District Court to see that that mandate is complied with and that is what I propose to do.

"As I say, nothing was done, the mandate was filed here on May 4, 1964, no steps were taken, apparently; it was the duty of the banks then to proceed to comply with it, no steps were taken; I gave considerable time, and finally in July I entered an order directing that a report be made, and from time to time upon request of counsel, both for the United States and the defendants, this Court granted extensions.

"I repeat this, that I do not believe this Court has jurisdiction to entertain this proposal that you filed here this morning or tendered this morning and I will have to make a ruling on the record as it now stands. In anticipation of the possibility of just this thing arising, I have prepared this order:

* * * * *

"' 'The record discloses that there has been a failure on the part of the defendant, First Security National Bank and Trust Company of Lexington, to comply with the mandate of the Supreme Court of the United States, filed in this court on May 4, 1964, as a result of the decision of the Supreme Court handed down in an opinion of the Court on April 6, 1964.

> "'It is therefore, the judgment of this court that the defendant, First Security National Bank and Trust Company of Lexington, its executive officers and directors, are in contempt of court. It is adjudged that they pay a fine of One Hundred Dollars a day beginning this February 16, 1965 and continuing until the defendants purge themselves of the contempt by a full compliance with the mandate of the Supreme Court.'
>
> "That is the judgment of the Court on this hearing this morning. Those orders will be entered.
>
> "Mr. Marshal, you may adjourn court."

At the same time the District Court entered an order directing the appellant to show cause by March 2, 1965 why a master should not be appointed to effect a separation of the businesses of the pre-existing banks and also to show cause why the bank, its executive officers and directors, should not be held in contempt for failing to to comply with an order of the District Court entered March 6, 1961 (Appendix L). That order, entered upon the Government's motion for a preliminary injunction restraining consummation of the consolidation, provided in effect that the records of the bank should be kept, insofar as practicable and in accordance with sound banking practices, so as to identify the separate assets and liabilities of the two banks as they existed at the time of the merger.

A lengthy response to the show cause order was filed by defendant on March 2, 1965 (Appendix M). At the same time a motion was filed in behalf of the bank, and "its executive officers and directors," to set aside the contempt order entered on February 16, 1965 (Appendix N).

On March 1, 1965, the United States filed motions in the District Court seeking (1) entry of an order of divestiture (Appendix O) and (2) entry of an order vacating that portion of the show cause order relating to the appointment of a master. The Government's proposed order of divestiture provided in part:

> "This order shall supersede, as of February 16, 1965, the prior order of this Court concerning contempt of the mandate of the Supreme Court." (Appendix O, p. 115a)

On March 18, 1965, pursuant to the court's order setting all pending motions down for hearing, the parties appeared in open court and presented oral arguments on their respective motions. Again, as it has consistently done, the United States supported appellants' position that the contempt order was unjustified and improper, saying:

> "We also urge that Your Honor let this order supersede the prior order entered in this action on February 16, because in our view, the mandate of the Supreme Court, envisioned an order of divestiture must be entered by this Court before the defendants could properly assume the obligation of going forward with divestiture." (Appendix C, p. 20a)

Nevertheless, at the conclusion of the arguments the District Court entered an order overruling the motion to set aside the contempt order of February 16, 1965 (Appendix P), saying in part:

> "I do not conclude, as counsel suggests, that in order to enter a contempt that this Court must have initiated an order or a proposal of how to comply with the judgment of the Supreme Court. I do not believe that a court must be put on terms in order to protect itself and I do not think that

it was the intention of the Supreme Court, and if it was the intention of the Supreme Court it is not made clear in their opinion, that it was the responsibility of this Court to initiate and inaugurate a method of placing these two banking institutions in the positions in which they were found to be on the 28th of February 1961. In other words, that before the Court could—to take the position of both the United States and the defendant here—before the Court could hold that a litigant is in contempt, the judge of the Court must first enter an order and that that order must be violated. That is not my judgment of what the authority and power of the Court in the matter of contempt is." (Appendix C, p. 30a)

The court held that sufficient response had been made to the show cause order, but denied the Government's motion to enter its proposed order of divestiture (Appendix P). Instead, the court entered a divestiture order which had been prepared in advance of the hearing (Appendix Q).

A motion by appellants for a stay of the February 16 contempt order pending review on appeal was denied (Appendix R), and on the same day a notice of appeal to this Court was filed.

On April 2, 1965, Mr. Justice Stewart issued an order (Appendix S) granting a stay of the contempt order insofar as it imposed a fine of one hundred dollars a day, pending the filing and disposition of this Jurisdictional Statement.

THE QUESTIONS ARE SUBSTANTIAL

It is clear beyond argument that in reversing the judgment of the District Court on the last appeal in this case, this Court left all questions relating to relief to be decided and ordered by the District Court in

"further proceedings." On remand, no order was entered directing divestiture or prescribing any other form of relief, and no proceedings were had or ordered to be had in which any form of relief was to be fashioned. Notwithstanding the absence of any such an order or proceedings, appellants' counsel immediately commenced good faith discussions and negotiations in a genuine attempt to settle and terminate this litigation by a consent decree. For a period of some nine months these negotiations and discussions continued. These efforts were undertaken with the concurrence—if not the encouragement—of the District Court, for as additional time was needed to carry on negotiations, the court below granted it. These efforts culminated in what was considered by both parties to be a satisfactory and complete solution—a plan of complete divestiture. The District Court's summary rejection of the fruits of these negotiations, and its concurrent adjudication, *sua sponte,* of contempt constituted a complete frustration of the good faith efforts of the parties to bring about the entry of a satisfactory decree without further litigation. If such arbitrary action is sustained the inevitable result will be to inhibit litigants from engaging in settlement negotiations and to force them to litigate all questions relating to relief. Without judicial direction but with the express sanction of the District Court, appellants' voluntary negotiations, with the cooperation of the plaintiff and the several regulatory agencies, produced an agreed plan of divestiture.

Instead of accepting the plan as recommended by the United States, which provided for an orderly procedure for divestiture by the reestablishment of a separate, independent bank out of the assets of the merged bank, the court summarily rejected the plan. It severely criticized the actions of the appellant bank and its ex-

ecutive officers and directors as "an imposition upon the Court, a reflection upon the Supreme Court and upon this Court, a careless attitude in the field of banking, and a discredit to this community" (Appendix C, p. 37a), and adjudged them guilty of contempt of court, fining them $100 per day until they purged themselves by a full compliance with the mandate of the Supreme Court.

1. The Contempt Order Was Entered By the Court Below Sua Sponte, Without Notice or Hearing and Without Any Evidence To Support It

The validity of the District Court's order of contempt must be tested by 18 U.S.C. § 401(3), which empowers that court to punish by contempt for "disobedience or resistance to its lawful writ, process, order, rule, decree, or command." Situations are conceivable where an order of contempt under this statute could be valid without notice or hearing.[7] However, the situation presented by this record is far different and seems wholly unprecedented.

Appellants were not adjudged guilty of violating a specific order of the court below or of any court. On the contrary, without any evidence in support of it, they were found guilty of violating a "mandate" of this Court that merely remanded this case for further proceedings and did not order or direct appellants to do or refrain from doing anything.

The situation appears even more astounding when consideration is given to the further fact that, wholly without judicial direction or order, appellants voluntarily agreed to the most severe remedy available in a

[7] For example, a party might file a pleading or an affidavit containing facts showing a clear violation of a court order and flaunting the authority of a court.

merger case—complete divestiture. In short, the contempt order is without any support in fact or law. To adjudge these appellants in contempt without any evidence of their guilt is a clear deprivation of due process of law. *Cf. Thompson* v. *City of Louisville*, 362 U.S. 199 (1960).

The substantiality of the question seems clear. If antitrust defendants must risk being summarily held in contempt while they are attempting to compromise litigation and negotiate a decree of divestiture, they are left with no choice but to litigate each case to the bitter end. Widespread publicity has been given to this contempt ruling. It is clearly erroneous, and if it is not corrected serious harm will be inflicted not only upon defendants but upon the time honored rule that the law encourages settlement of litigation.

2. The Order of Contempt Results From a Misconstruction of and Constitutes An Unjustified Interference With the Opinion and Judgment of This Court

For one to be guilty of contempt under 18 U.S.C. § 401(3) there must first be an order which states "with reasonable specificity the acts which the respondent is to do or refrain from doing."[8] In contempt proceedings for its enforcement, a decree will not be expanded by implication or intendment beyond the meaning of its terms when read in the light of the issues and the purpose for which the suit was brought, and the facts found must constitute a plain violation of the decree so read.[9] The rule is universally recognized and it is

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[8] *National Labor Relations Board* v. *Express Pub. Co.*, 312 U.S. 426, 433 (1941).

[9] *Terminal Railroad Ass'n* v. *United States*, 266 U.S. 17, 29 (1924).

generally couched in much stronger language.[10] Contempt of court is indeed a grave thing, and because of this no court should indulge in a strained or extreme construction of its order so as to spell out some theoretical and abstract violation of its order.[11] The position of appellants cannot be stated better or more concisely than this statement in *Walling* v. *Crane,* 158 F. 2d 80, 84 (5th Cir. 1946):

> "The very nature of the proceeding in either civil or criminal contempt for an alleged disobedience of a decree of the Court, *requires that the language in the commands of the decree be clear and certain. No person may be adjudged in contempt for the disobedience of a non-existent order.*" (Emphasis added.)

In *Berry* v. *Midtown Service Corp.*, 104 F. 2d 107, 110, (2d Cir.), *cert. dismissed per stipulation*, 308 U.S. 629 (1939), the court stated that "federal cases show an equal insistence that a party must have violated an express court order before he can be punished for contempt under the final clause of section 385 [now 18 U.S.C. § 401(3)]."

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[10] In a dissenting opinion in *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, 195 (1949), Mr. Justice Frankfurter commented as follows: "Obedience must of course be secured for the command of a court. To secure such obedience is the function of a proceeding for contempt. But courts should be explicit and precise in their commands and should only then be strict in exacting compliance. To be both strict and indefinite is a kind of judicial tyranny." In *Berry* v. *Midtown Service Corp.*, 104 F. 2d 107, 111 (2nd Cir.) *cert. dismissed per stipulation*, 308 U.S. 629 (1939) the court said: "Before a person should be subject to punishment for violating a command of the court, the order should inform him in definite terms as to the duties thereby imposed upon him."

[11] See *National Labor Relations Board* v. *Standard Trouser Co.*, 162 F. 2d 1012, 1015 (4th Cir. 1947).

Therefore, before one can be punished for contempt under 18 U.S.C. 401(3) there must first be an order containing clear and certain directions, and there must be facts showing a plain violation of the terms of the order. Both of these requirements are clearly absent in this case.

It seems clear that the court below misconstrued the opinion and judgment of this Court insofar as the question of the appropriate remedy was concerned. At the February 16 hearing the lower court referred to "the Supreme Court's mandate, which says that these two banks should go back where they were on the 28th of February 1961." (Appendix B, page 12a). This Court did not direct divestiture, nor did it issue any directions to the appellants.

Even if it is assumed, however, that this Court's opinion and judgment constituted sufficiently clear and certain commands to appellants to initiate or to participate in further proceedings, the record is clear that substantial and significant steps promptly were undertaken by appellants, in conjunction with the plaintiff, to fashion and agree upon an appropriate remedy. There is no evidence whatsoever in the record to support the lower court's conclusion that after this Court's judgment was sent down, "nothing was done, . . . no steps were taken." (Appendix B, p. 13a).

It is clear, therefore, that the contempt order was not only beyond the court's statutory power, but was also an unjustified interference with the good faith efforts of the parties to arrive at a final judgment consistent with this Court's opinion.

3. The District Court Had No Power or Jurisdiction To Hold Appellants in Contempt of An Order or Judgment of the Supreme Court

The power of contempt is an inherent power of a court, to be exercised in the vindication of the processes of that court. Appellants have no doubt that *this* Court could have held them in contempt for failing to comply with an order of this Court directing them to submit or effectuate a plan of divestiture. Neither is there any doubt that the District Court could have held appellants in contempt for failure to obey an order of that court entered in implementation of this Court's judgment after the remand. Absent any implementing order in the District Court, however, that court had no jurisdiction to vindicate what it assumed to be a command of this Court.

While the expressions of the District Court are emphatically to the contrary,[12] it is clear that his judicial power has its limitations.

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[12] In the course of the hearing of March 18, 1965, the following statements were made from the bench by the District Court:

> "The power of this Court is unlimited. Those of us who are commissioned to serve as trial judges, our power is greater possibly than any other single official in the United States. The Court has the power to close that bank, in order to carry out the judgment of the Supreme Court. The Court has the power to fine this bank a substantial sum of money—I mean a substantial sum of money relatively speaking, in accordance with what its assets are. The Court has power to appoint a special master and the Court has the authority and the power to absolutely regulate every step that is being taken there to carry out this judgment in this case." (Appendix C, pp. 38a-39a).

In a series of recent opinions, this Court has reviewed the history of this contempt statute.[13] It has stated that the present statute

> "is based on an Act passed in 1831 in order to correct serious abuses of the summary contempt power that had grown up and was intended as a 'drastic delimitation . . . of the broad undefined power of the inferior federal courts under the Act of 1789,' revealing 'a Congressional intent to safeguard Constitutional procedures by limiting courts, as Congress is limited in contempt cases, to "the least possible power adequate to the end proposed."' "[14]

Thus, although the District Court certainly has the power necessary to vindicate its own processes, its statutory contempt power does not extend to the summary vindication of the processes of another tribunal.

No case has been found where this precise question was presented and decided by any court. The statute seems clear that a court has no power to punish by contempt for the violation of the orders of another court. It gives each court explicit power to punish for violation of "*its*" lawful writ, etc. A reasonable construction of the statute negatives any power to punish for violation of another court's order.

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[13] *In re McConnell*, 370 U.S. 230 (1962); *Green* v. *United States*, 356 U.S. 165 (1958); *Cammer* v. *United States*, 350 U.S. 399 (1956); *In re Michael*, 326 U.S. 224 (1945); *Nye* v. *United States*, 313 U.S. 33 (1941).

[14] *In re McConnell*, 370 U.S. 230, 233-34 (1962).

CONCLUSION

The error of the District Court is plain. Moreover, as the United States pointed out in its memorandum in support of appellants' application for a stay, there is good reason to believe that the contempt order is having harmful effects upon the business of the appellant bank and is making orderly divestiture more difficult.[15] Therefore, we respectfully urge that this Court note probable jurisdiction of this appeal. Furthermore, because the error below is manifest and the issues are clear, the appellants suggest that this Court now has before it all that it needs for a final disposition of this matter. Accordingly, appellants move that the Court summarily reverse the judgment of the District Court without submission of further briefs or oral argument.

Respectfully submitted,

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[15] In *United States* v. *E. I. du Pont de Nemours Co.*, 366 U.S. 316, 326 (1961) the Court, in discussing divestiture as the most drastic but effective antitrust remedy, observed that "Courts are not authorized in civil proceedings to punish antitrust violators, and relief must not be punitive."

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